Supreme Court, U. S.
FILED
MAY 27 1975
MICHAEL RODAK, JR., CLERK

No. 74-1488

In the Supreme Court of the United States

OCTOBER TERM, 1974

ROGERS C. B. MORTON,
SECRETARY OF THE INTERIOR, APPELLANT

v.

STATE OF NEW MEXICO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

JURISDICTIONAL STATEMENT

ROBERT H. BORK,
Solicitor General,

WALLACE H. JOHNSON,
Assistant Attorney General,

MARK L. EVANS,
Assistant to the Solicitor General,

EDMUND B. CLARK,
DIRK D. SNEL,
Attorneys,

Department of Justice,
Washington, D.C. 20530.

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No.

ROGERS C. B. MORTON,
SECRETARY OF THE INTERIOR, APPELLANT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1a-6a) is not yet reported.

JURISDICTION

The judgment of the three-judge district court was entered on February 28, 1975 (App. B, *infra*, pp. 7a-8a). The notice of appeal was filed on March 28,

1975 (App. C, *infra*, p. 9a). The first amended judgment of the district court was entered on March 31, 1975 (App. D, *infra*, pp. 10a-11a). The supplemental notice of appeal was filed on April 14, 1975 (App. E, *infra*, pp. 12a-13a). The jurisdiction of this Court is invoked under 28 U.S.C. 1252 and 1253.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. Article IV, Section 3, of the United States Constitution (the "Property Clause") provides in part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

2. The Wild Free-Roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. (Supp. III) 1331-1340, enacted December 15, 1971, is reproduced in Appendix F, *infra*, pp. 14a-20a.

3. The relevant provisions of Sections 47-14-1, 47-14-5, and 47-23-2(A) of the New Mexico Statutes Annotated are set forth in Appendix G, *infra*, p. 21a.

QUESTION PRESENTED

Whether the Wild Free-Roaming Horses and Burros Act, which protects unbranded and unclaimed horses and burros on public lands of the United States from capture, harassment, or death, exceeds the powers conferred upon Congress by the Property and Commerce Clauses of the Constitution.

STATEMENT

1. At issue in this case is the constitutionality of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Supp. III) 1331-1340 (App. F, *infra*, pp. 14a-20a). Section 1 of the Act establishes a policy of protecting unbranded and unclaimed horses and burros on public lands of the United States "from capture, branding, harassment, or death," and it provides that "to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands" (16 U.S.C. 1331).

The Act provides that all wild free-roaming horses and burros on the public lands are committed to the jurisdiction of the Secretary of the Interior, who is "directed to protect and manage [the animals] as components of the public lands * * * in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands" (Section 3(a), 16 U.S.C. 1333(a)). The Act makes it a crime to remove a protected horse or burro from the public lands or convert such an animal to private use without the Secretary's permission, to maliciously kill or harass such an animal, or to process its remains into commercial products (Section 8(a), 16 U.S.C. 1338(a)). If horses or burros "stray from

public lands onto privately owned land, the owners of such land may inform the nearest Federal marshall or agent of the Secretary, who shall arrange to have the animals removed" (Section 4, 16 U.S.C. 1334).[1]

2. In January 1974, a New Mexico rancher complained to the Bureau of Land Management of the United States Department of the Interior, and later to the New Mexico Livestock Board, that several burros were wandering on his private land and on public lands where he grazed his cattle pursuant to a federal permit. He claimed that the burros were molesting his cattle and eating their feed.

On about February 11, 1974, agents of the New Mexico Livestock Board, purportedly acting pursuant to the New Mexico Estray Law (N. Mex. Stat. Ann. §§ 47-14-1, *et seq.*), rounded up and removed 19 unbranded and unclaimed burros from the public lands of the United States (Tr. 16; Pl. Ex. 5). The Board thereafter sold the 19 burros to private purchasers at auction. After learning of the round-up and sale, the Bureau of Land Management, asserting jurisdiction over the burros under the Wild Free-Roaming Horses and Burros Act, demanded that the animals be returned to the public domain.

In March 1974, respondents (the State of New Mexico, the New Mexico Livestock Board, the Board's director, and a purchaser of the burros) brought this

[1] The Secretary's regulations implementing the statute appear at 43 C.F.R. Part 4710.

action in the United States District Court for the District of New Mexico. The complaint sought a declaration that the Wild Free-Roaming Horses and Burros Act is unconstitutional and an injunction against the Act's enforcement. A three-judge court was convened pursuant to 28 U.S.C. 2282.

On cross-motions for summary judgment, the district court ruled that the Act is unconstitutional and permanently enjoined the Secretary of the Interior from enforcing its provisions (App. A, *infra*, pp. 1a-6a).[2] The court held that Congress is without constitutional authority to regulate animals found on federal lands unless such regulation is necessary for the "*protection* of the public lands from damage of some kind" (*id.* at 5a; emphasis in original). Here, however, "[t]he statute is aimed at protecting the wild horses and burros, not at protecting the land they live on," and "[t]here is no Congressional finding nor any evidence to indicate that wild horses and burros are damaging the public lands" (*ibid.*). The court also held that the Act cannot be sustained as an exercise of congressional authority under the Commerce Clause, because "all the evidence establishes that the wild burros in question here do not migrate across state lines" and "Congress made no findings to indicate that it was in any way relying on the Commerce Clause in enacting this statute" (*id.* at 5a-6a).

[2] On March 7, 1975, the district court stayed its injunction pending further order of the court.

THE QUESTION IS SUBSTANTIAL

Although an estimated two million wild horses once roamed the plains and mountains in the West, in this century their numbers have drastically dwindled. As Congress found in 1971, these animals "have been cruelly captured and slain and their carcasses used in the production of pet food and fertilizer. They have been used for target practice and harassed for 'sport' and profit. In spite of public outrage, this bloody traffic continues unabated, and * * * this senseless slaughter must be brought to end."[3] In order to prevent wild horses and burros from becoming extinct, Congress enacted the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Supp. III) 1331-1340, which protects these animals on the public lands of the United States by prohibiting their removal, harassment, or slaughter. Although Congress expressly found in Section 1 of the Act (16 U.S.C. 1331) that wild horses and burros are "an integral part of the natural system of the public lands," the district court held that the Act exceeded congressional authority under the Constitution and that Congress had no power to protect these animals. The decision is plainly wrong and should be reversed.

1. The power of Congress to regulate and protect wild animals on the public lands is implicit in its plenary jurisdiction over federal territory. Article IV, Section 3, of the Constitution provides that "Congress shall have Power to dispose of and make all

[3] S. Rep. No. 92-242, 92d Cong., 1st Sess. 1-2 (1971).

needful Rules and Regulations respecting the Territory and other Property belonging to the United States." This Court has repeatedly stated that "[t]he power over the public land thus entrusted to Congress is without limitations." *United States* v. *San Francisco*, 310 U.S. 16, 29; *United States* v. *California*, 332 U.S. 19, 27; *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 21; *Alabama* v. *Texas*, 347 U.S. 272, 273; *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 294-295.

That plenary power extends not only to the land itself but also to "what the land contain[s]" (*Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 333). It follows that Congress may provide for the management and control of the mineral, water, energy, aesthetic, and other natural resources of the public domain. In *Ashwander*, for example, the Court held that the water power created by a government dam, the right to convert the power into electric energy, and the electric energy thus produced constituted property of the United States, the disposition of which was within the exclusive control of Congress under the Property Clause (297 U.S. at 330-340).

With respect to federal territory, moreover, Congress has full legislative jurisdiction, "analogous to the police power of the several States" (*Camfield* v. *United States*, 167 U.S. 518, 525), and may therefore broadly govern in the interest of the public health, welfare, and morals. In addition, "the Government has, with respect to its own lands, the rights

of an ordinary proprietor, to maintain its possession and to prosecute trespassers" (*id.* at 524). See also *Sinclair* v. *United States*, 279 U.S. 263, 297; *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 474.

Congress specifically determined in the Wild Free-Roaming Horses and Burros Act that wild horses and burros are "an integral part of the natural system of the public lands" (Section 1, 16 U.S.C. 1331). Protection and management of the animals was deemed necessary "for achievement of an ecological balance on the public lands" (H.R. Conf. Rep. No 92-681, 92d Cong., 1st Sess. 5 (1971)). Especially in light of those findings, it is plain that Congress acted within the scope of its broad authority under the Property Clause by providing for the protection of wild horses and burros on the public lands from continued depredation by man.

This Court held in *Hunt* v. *United States*, 278 U.S. 96, that the government's authority over the public lands includes the power to manage and control the deer population in national forests and game preserves. In that case, as a result of overpopulation, the deer had "greatly injured the lands in the reserves by over-browsing upon and killing valuable young trees, shrubs, bushes and forage plants" (278 U.S. at 99). The Secretary of Agriculture, acting pursuant to statutory authority, caused large numbers of deer to be killed and their carcasses to be shipped outside the limits of the reserves. The Court held that "the power of the United States to thus protect its lands and property does not admit of

doubt, * * * the game laws or any other statute of the state to the contrary notwithstanding" (*id.* at 100).

The district court in the present case inferred from *Hunt* that the power of Congress is limited to protecting federal lands from physical damage and does not extend to protecting wild animals found on the lands. But *Hunt* held only that damage to the land was a *sufficient* basis for invoking the Property Clause; it did not hold or imply that damage is *necessary* as a basis for federal regulation. Just as Congress may provide for the protection of valuable water or mineral resources on federal lands, so too it may provide for the protection of wildlife on federal lands,[4] irrespective of any threat of damage to the land itself.[5]

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[4] Under the district court's rationale, many of the federal wildlife programs would be unconstitutional. See, *e.g.*, the National Wildlife Refuge System Act of 1966, as amended, 16 U.S.C. 668dd-668ee; 16 U.S.C. 671-697a (establishing specific federal wildlife sanctuaries); 16 U.S.C. 26, 98-99 (providing for wildlife protection in national parks); Fur Seal Act of 1966, 16 U.S.C. 1151, *et seq.*; Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. (Supp. III) 1361, *et seq.*; Endangered Species Act of 1973, 16 U.S.C. (Supp. III) 1531, *et seq.*; Wild and Scenic Rivers Act, 16 U.S.C. 1271, *et seq.*; 18 U.S.C. 41 (penalizing the seizure or disturbance of wildlife on lands set apart for sanctuaries, refuges, or breeding grounds).

[5] In any event, Congress found, contrary to the district court's assertion (App. A, *infra*, p. 5a), that federal regulation of wild horses and burros was necessary in part to protect the public lands from damage. The Department of Agri-

2. The Act is also within the scope of Congress's legislative authority to regulate interstate commerce. The legislative history shows that Congress was concerned with the commercial exploitation of wild horses and burros and that the Act was designed in part to prevent such exploitation. The Senate Committee found that wild horses and burros "have been cruelly captured and slain and their carcasses used in the production of pet food and fertilizer"; it was "the expressed intent of the committee to remove the possibility of monetary gain from exploitation of these animals" (S. Rep. No. 92-242, *supra*, pp. 1-2, 4). The House Committee likewise sought to end the "commercialization" of these animals by eliminating "the processing of wild horses and burros into pet food" (H.R. Rep. No. 92-480, *supra*, p. 4).

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culture informed the House and Senate Committees that "[w]hen horses and burros become too numerous they are particularly destructive of their range" and that "[a]ny management system would need some realistic provisions for herd reduction" (S. Rep. No. 92-242, 92d Cong., 1st Sess. 12 (1971); H.R. Rep. No. 92-480, 92d Cong., 1st Sess. 12 (1971)). Although the principal objective of the legislation was to "insure the preservation and protection of the few remaining wild free-roaming horses and burros" (H.R. Conf. Rep No. 92-681, 92d Cong., 1st Sess. 7 (1971)), both Committees recognized that "some control over the numbers of animals may be necessary in order to maintain an ecological balance in an area" (S. Rep. No. 92-242, *supra*, p. 4; H.R. Rep. No. 92-480, *supra*, p. 5). The Act accordingly gives the Secretary of the Interior the authority to reduce the number of horses and burros in an overpopulated area (Section 3(b) and (c), 16 U.S.C. 1333(b) and (c)).

The Act accordingly makes it a crime to process the remains of a wild horse or burro into "commercial products" (Section 8(a)(4), 16 U.S.C. 1338(a)(4)); it permits the "customary disposal" of the remains of a deceased animal but provides that "in no event shall such remains * * * be sold for any consideration, directly or indirectly" (Section 3(d), 16 U.S.C. 1333(d)).

The effect upon interstate commerce of the commercial exploitation of wild horses and burros "empowered Congress to enact appropriate legislation," and that legislation is no less valid because it serves other purposes as well. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 257; *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 528.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

MARK L. EVANS,
Assistant to the Solicitor General.

EDMUND B. CLARK,
DIRK D. SNEL,
Attorneys.

MAY 1975.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 74-127

[Filed at Albuquerque Feb. 28, 1975,
L. G. Kanaly, Clerk]

STATE OF NEW MEXICO, NEW MEXICO STATE LIVESTOCK BOARD, LEE S. GARNER, and CLAUDE FOSTER, PLAINTIFFS

v.

ROGERS C. B. MORTON, Secretary, United States Department of the Interior, VICTOR R. ORTEGA, United States Attorney for the District of New Mexico, and UNITED STATES OF AMERICA, DEFENDANTS

MEMORANDUM OPINION

This action came before the three-judge district court seeking an injunction against the enforcement of the Wild Free-roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340, as being unconstitutional. Jurisdiction of this court is established under sections 1331, 2282, and 2284 of Title 28, U.S.C.

The controversy involved here began when a New Mexico rancher, Kelley Stephenson, discovered several unbranded and unclaimed burros wandering on his private land, and also on public land on which he grazed his cattle pursuant to federal grazing permits. The burros were molesting his cattle, and eat-

ing the feed supplement he had placed out for the cattle. Mr. Stephenson requested the Bureau of Land Management to remove the burros and was refused. He then contacted the New Mexico Livestock Board. The Board rounded up nineteen burros and subsequently sold them at auction pursuant to the provisions of the New Mexico Estray Law, §§ 47-14-1 et seq., N.M.Stat.Ann. (Repl. 1966). An "estray" is defined as:

> "Any bovine animal, horse, mule or ass, found running at large upon public or private lands, either fenced or unfenced, in the state of New Mexico, whose owner is unknown in the section where found, or which shall be fifty (50) miles or more from the limits of its usual range or pasture, or that is branded with a brand which is not on record in the office of the cattle sanitary board of New Mexico . . . ." § 47-14-1, N.M.Stat.Ann. (Repl. 1966).

Subsequent to the auction, the United States asserted the right to possession of the burros under the Wild Free-roaming Horses and Burros Act, and demanded that they be returned to the public domain. This lawsuit ensued.

The federal statute purports to regulate "all unbranded and unclaimed horses and burros on public lands of the United States." 16 U.S.C. § 1332(b). The definition of wild free-roaming horses and burros set out in the regulations promulgated under this section is even broader. Because of our disposition of the case, we do not find it necessary to comment

on these regulations. The authority of Congress to regulate these animals must come from a power specifically granted to it in the Constitution. Afroyim v. Rusk, 387 U.S. 253. The Congressional findings and policy behind the Act are stated in section 1331:

> "Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene. It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harrassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands."

From these findings, it appears that the Act is grounded in the "Territorial Clause:"

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S.Const. art. IV, § 3.

Congress is here attempting to exercise complete regulation of wild horses and burros whenever found on public land. This conflicts with both the historical interpretation of the Territorial Clause, and the traditional doctrines concerning wild animals.

Wild horses and burros do not become "property" of the United States simply by being physically present on the "territory" or land of the United States. The doctrine of the common law, dating back to the Roman law, has been that wild animals are owned by the state in its sovereign capacity, in trust for the benefit of the people. This sovereign ownership vested in the colonial government and was passed to the states. Gear v. Connecticut, 161 U.S. 519; New Mexico State Game Comm'n v. Udall, 410 F.2d 1197 (10th Cir.), *cert. denied*, 396 U.S. 961. Even though the state ownership doctrine has been described as a legal fiction, Toomer v. Witsell, 334 U.S. 385, it has never been abrogated. Defendants rely on Missouri v. Holland, 252 U.S. 416, to overcome the viability of state ownership. Such reliance is misplaced in that the decision was based on the treaty power of the United States as related to migratory birds. Here the United States must find authority to regulate wild horses and burros in its power to regulate public lands.

The Territorial Clause has been described as establishing "full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them." Utah Power & Light Co. v. United States, 243 U.S. 389, 404. The Government may constitutionally prevent the obstruction of free passage across public lands, McKelvey v. United States, 260 U.S. 353, and protect the public lands from nuisances on adjoining property. Camfield v. United States, 167 U.S. 518.

Three cases have upheld the power of the federal government to kill deer which were damaging federally owned lands through overbrowsing. Hunt v. United States, 278 U.S. 96; New Mexico State Game Comm'n v. Udall, *supra*; Chalk v. United States, 114 F.2d 207 (4th Cir.), *cert. denied*, 312 U.S. 679. *New Mexico State Game Comm'n* even approved the killing of deer as part of a research project to control future population, and thus the possibility of future damage from over-population. The common thread running through the cases decided under the Territorial Clause is that of *protection* of the public lands from damage of some kind. *See also*, United States v. Alford, 274 U.S. 264, concerning the protection of public lands from fire.

There is no Congressional finding nor any evidence to indicate that wild horses and burros are damaging the public lands. The statute is aimed at protecting the wild horses and burros, not at protecting the land they live on. Thus, we find that the Wild Free-roaming Horses and Burros Act cannot be sustained as an exercise of the power granted to Congress in Art. IV, § 3 of the Constitution.

The Government argues in its brief that the Act may be sustained as an exercise of the power granted in the Commerce Clause. No evidence was presented to support this theory; in fact, all the evidence establishes that the wild burros in question here do not migrate across state lines. Further, the Congress made no findings to indicate that it was in any way

relying on the Commerce Clause in enacting this statute. This argument must fail.

Since we find the federal act to be unconstitutional, there is no question of preemption of the New Mexico Estray Law. National Railroad Passenger Corp. v. Miller, 358 F.Supp. 1321 (D.Kan.), *aff'd*, 414 U.S. 948. The defendants are hereby permanently enjoined from enforcing the provisions of the Wild Free-roaming Horses and Burros Act, 16 U.S.C. §§ 1331 et seq.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 74-127 Civil

[Filed at Albuquerque Feb. 28, 1975,
L. G. Kanaly, Clerk]

STATE OF NEW MEXICO, NEW MEXICO STATE LIVESTOCK BOARD, LEE S. GARNER, and CLAUDE FOSTER, PLAINTIFFS

vs.

ROGERS C. B. MORTON, Secretary, United States Department of the Interior, VICTOR R. ORTEGA, United States Attorney for the District of New Mexico, and THE UNITED STATES OF AMERICA, DEFENDANTS

JUDGMENT

THIS MATTER having come before the Court upon the complaint of the plaintiffs seeking declaratory and injunctive relief, the Court having considered the evidence, briefs and arguments of counsel, and the Court having filed a Memorandum Opinion herein concluding that certain declaratory and injunctive relief is appropriate and should be granted, therefore, it is hereby,

ORDERED, ADJUDGED, AND DECREED that the Wild Free-Roaming Horses And Burros Act, Section 1331 through 1340, Title 16, United States Code,

be, and the same hereby is, declared unconstitutional. It is further

ORDERED, ADJUDGED AND DECREED that the defendants herein be, and the same hereby are, permanently enjoined and restrained from enforcing or executing the operation of the aforementioned act. It is further

ORDERED, ADJUDGED AND DECREED that each party to this action bear its own costs.

/s/ Oliver Seth
United States Circuit Judge

/s/ H. Vearle Payne
United States District Judge

/s/ E. L. Mechem
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 74-127 Civil

[Original Filed in My Office Mar. 28, 1975,
L. G. Kanaly, Clerk]

STATE OF NEW MEXICO, NEW MEXICO STATE LIVESTOCK BOARD, LEE S. GARNER, and CLAUDE FOSTER, PLAINTIFFS

vs.

ROGERS C. B. MORTON, Secretary, United States Department of Interior, DEFENDANT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the defendant Rogers C. B. Morton appeals to the Supreme Court of the United States from the judgment entered in this action in favor of plaintiffs, on February 28, 1975. This appeal is taken pursuant to 28 U.S.C. 1252 and 28 U.S.C. 1253.

VICTOR R. ORTEGA
United States Attorney

By: _____
JAMES B. GRANT
Assistant United States Attorney

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 74-127 Civil

[Filed at Albuquerque Mar. 31, 1975,
L. G. Kanaly, Clerk]

STATE OF NEW MEXICO, NEW MEXICO STATE LIVESTOCK BOARD, LEE S. GARNER, and CLAUDE FOSTER, PLAINTIFFS

vs.

ROGERS C. B. MORTON, Secretary, United States Department of Interior, DEFENDANT

FIRST AMENDED JUDGMENT

THIS MATTER having come before the Court upon the complaint of the plaintiffs seeking declaratory and injunctive relief, the Court having considered the evidence, briefs and arguments of counsel and the Court having filed a Memorandum Opinion herein concluding that certain declaratory and injunctive relief is appropriate and should be granted, therefore, it is hereby,

ORDERED, ADJUDGED, AND DECREED that the Wild Free-Roaming Horses And Burros Act, Section 1331 through 1340, Title 16, United States Code, be, and the same hereby is, declared unconstitutional. It is further

ORDERED, ADJUDGED AND DECREED that the defendant herein be, and the same hereby is, permanently enjoined and restrained from enforcing or executing the operation of the aforementioned act. It is further

ORDERED, ADJUDGED AND DECREED that each party to this action bear its own costs.

/s/ Oliver Seth
United States Circuit Judge

/s/ H. Vearle Payne
United States District Judge

/s/ E. L. Mechem
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 74-127 Civil

[Original Filed in My Office Apr. 14, 1975,
L. G. Kanaly, Clerk]

STATE OF NEW MEXICO, NEW MEXICO STATE LIVESTOCK BOARD, LEE S. GARNER, and CLAUDE FOSTER, PLAINTIFFS

vs.

ROGERS C. B. MORTON, Secretary, United States Department of Interior, DEFENDANT

SUPPLEMENTAL NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the defendant Rogers C. B. Morton appeals to the Supreme Court of the United States from the judgment entered in this action in favor of plaintiffs, on February 28, 1975, as modified by the first amended judgment entered March 31, 1975. This appeal is taken pursuant to 28 U.S.C. 1252 and 28 U.S.C. 1253.

VICTOR R. ORTEGA
United States Attorney

Original Signed By: JAMES B. GRANT
JAMES B. GRANT
Assistant United States Attorney

This will certify that a true copy of the foregoing pleading was mailed to opposing counsel of record this 14th day of April, 1975.

Original Signed By: JAMES B. GRANT
(Asst.) United States Attorney

APPENDIX F

Public Law 92-195
92nd Congress, S. 1116

December 15, 1971

AN ACT

To require the protection, management, and control of wild free-roaming horses and burros on public lands

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene. It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands.

SEC. 2. As used in this Act—

(a) "Secretary" means the Secretary of the Interior when used in connection with public lands administered by him through the Bureau of Land Management and the Secretary of Agriculture in connection with public lands administered by him through the Forest Service;

(b) "wild free-roaming horses and burros" means all unbranded and unclaimed horses and burros on public lands of the United States;

(c) "range" means the amount of land necessary to sustain an existing herd or herds of wild free-roaming horses and burros, which does not exceed their known territorial limits, and which is devoted principally but not necessarily exclusively to their welfare in keeping with the multiple-use management concept for the public lands;

(d) "herd" means one or more stallions and his mares; and

(e) "public lands" means any lands administered by the Secretary of the Interior through the Bureau of Land Management or by the Secretary of Agriculture through the Forest Service.

SEC. 3. (a) All wild free-roaming horses and burros are hereby declared to be under the jurisdiction of the Secretary for the purpose of management and protection in accordance with the provisions of this Act. The Secretary is authorized and directed to protect and manage wild free-roaming horses and burros as components of the public lands, and he may designate and maintain specific ranges on public lands as sanctuaries for their protection and preservation, where the Secretary after consultation with the wildlife agency of the State wherein any such range is proposed and with the Advisory Board established in section 7 of this Act deems such action desirable. The Secretary shall manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural

ecological balance on the public lands. He shall consider the recommendations of qualified scientists in the field of biology and ecology, some of whom shall be independent of both Federal and State agencies and may include members of the Advisory Board established in section 7 of this Act. All management activities shall be at the minimal feasible level and shall be carried out in consultation with the wildlife agency of the State wherein such lands are located in order to protect the natural ecological balance of all wildlife species which inhabit such lands, particularly endangered wildlife species. Any adjustments in forage allocations on any such lands shall take into consideration the needs of other wildlife species which inhabit such lands.

(b) Where an area is found to be overpopulated, the Secretary, after consulting with the Advisory Board, may order old, sick, or lame animals to be destroyed in the most humane manner possible, and he may cause additional excess wild free-roaming horses and burros to be captured and removed for private maintenance under humane conditions and care.

(c) The Secretary may order wild free-roaming horses or burros to be destroyed in the most humane manner possible when he deems such action to be an act of mercy or when in his judgment such action is necessary to preserve and maintain the habitat in a suitable condition for continued use. No wild free-roaming horse or burro shall be ordered to be destroyed because of overpopulation unless in the judg-

ment of the Secretary such action is the only practical way to remove excess animals from the area.

(d) Nothing in this Act shall preclude the customary disposal of the remains of a deceased wild free-roaming horse or burro, including those in the authorized possession of private parties, but in no event shall such remains, or any part thereof, be sold for any consideration, directly or indirectly.

SEC. 4. If wild free-roaming horses or burros stray from public lands onto privately owned land, the owners of such land may inform the nearest Federal marshall or agent of the Secretary, who shall arrange to have the animals removed. In no event shall such wild free-roaming horses and burros be destroyed except by the agents of the Secretary. Nothing in this section shall be construed to prohibit a private landowner from maintaining wild free-roaming horses or burros on his private lands, or lands leased from the Government, if he does so in a manner that protects them from harassment, and if the animals were not willfully removed or enticed from the public lands. Any individuals who maintain such wild free-roaming horses or burros on their private lands or lands leased from the Government shall notify the appropriate agent of the Secretary and supply him with a reasonable approximation of the number of animals so maintained.

SEC. 5. A person claiming ownership of a horse or burro on the public lands shall be entitled to recover it only if recovery is permissible under the

branding and estray laws of the State in which the animal is found.

SEC. 6. The Secretary is authorized to enter into cooperative agreements with other landowners and with the State and local governmental agencies and may issue such regulations as he deems necessary for the furtherance of the purposes of this Act.

SEC. 7. The Secretary of the Interior and the Secretary of Agriculture are authorized and directed to appoint a joint advisory board of not more than nine members to advise them on any matter relating to wild free-roaming horses and burros and their management and protection. They shall select as advisers persons who are not employees of the Federal or State Governments and whom they deem to have special knowledge about protection of horses and burros, management of wildlife, animal husbandry, or natural resources management. Members of the board shall not receive reimbursement except for travel and other expenditures necessary in connection with their services.

SEC. 8. Any person who—

(1) willfully removes or attempts to remove a wild free-roaming horse or burro from the public lands, without authority from the Secretary, or

(2) converts a wild free-roaming horse or burro to private use, without authority from the Secretary, or

(3) maliciously causes the death or harassment of any wild free-roaming horse or burro, or

(4) processes or permits to be processed into commercial products the remains of a wild free-roaming horse or burro, or

(5) sells, directly or indirectly, a wild free-roaming horse or burro maintained on private or leased land pursuant to section 4 of this Act, or the remains thereof, or

(6) willfully violates a regulation issued pursuant to this Act,

shall be subject to a fine of not more than $2,000, or imprisonment for not more than one year, or both. Any person so charged with such violation by the Secretary may be tried and sentenced by any United States commissioner or magistrate designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in section 3401, title 18, United States Code.

(b) Any employee designated by the Secretary of the Interior or the Secretary of Agriculture shall have power, without warrant, to arrest any person committing in the presence of such employee a violation of this Act or any regulation made pursuant thereto, and to take such person immediately for examination or trial before an officer or court of competent jurisdiction, and shall have power to execute any warrant or other process issued by an officer or court of competent jurisdiction to enforce the provisions of this Act or regulations made pursuant thereto. Any judge of a court established under the laws of the United States, or any United States magistrate may, within his respective jurisdiction,

upon proper oath or affirmation showing probable cause, issue warrants in all such cases.

SEC. 9. Nothing in this Act shall be construed to authorize the Secretary to relocate wild free-roaming horses or burros to areas of the public lands where they do not presently exist.

SEC. 10. After the expiration of thirty calendar months following the date of enactment of this Act, and every twenty-four calendar months thereafter, the Secretaries of the Interior and Agriculture will submit to Congress a joint report on the administration of this Act, including a summary of enforcement and/or other actions taken thereunder, costs, and such recommendations for legislative or other actions as he might deem appropriate.

The Secretary of the Interior and the Secretary of Agriculture shall consult with respect to the implementation and enforcement of this Act and to the maximum feasible extent coordinate the activities of their respective departments and in the implementation and enforcement of this Act. The Secretaries are authorized and directed to undertake those studies of the habits of wild free-roaming horses and burros that they may deem necessary in order to carry out the provisions of this Act.

Approved December 15, 1971.

APPENDIX G

Sections 47-14-1, 47-14-5, and 47-23-2(A) of the New Mexico Statutes Annotated provide in part:

> 47-14-1. *Definition of "estray."*—Any bovine animal, horse, mule or ass, found running at large upon public or private lands, either fenced or unfenced, in the state of New Mexico, whose owner is unknown in the section where found, or which shall be fifty [50] miles or more from the limits of its usual range or pasture, or that is branded with a brand which is not on record in the office of the cattle sanitary board of New Mexico, shall be known as an "estray," * * *. [1966 Repl.]
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> 47-14-5. *Sale of unclaimed estrays—Bill of sale—Effect—Sale without advertisement—Conditions.*—If said estray animal or animals shall not be claimed within twenty [20] days after the last publication of said advertisement they shall be sold by the cattle sanitary board through an authorized brand inspector of said board, in such manner as the board may direct. * * * [1966 Repl.]
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> 47-23-2. *New Mexico livestock board created —Transfer of powers—Transfer of property.*—A. * * * The New Mexico Livestock Board shall have all powers which have heretofore been held by the cattle sanitary board * * * and those powers are hereby transferred to the New Mexico livestock board. [1973 Supp.]

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